81-2224

No. 81-2055

Office - Supreme Court, U.S.
FILED
JUN 24 1982
ALEXANDER L. STEVAS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1981

HENRY CURTIS, ALBERT F. DUVAL, ROGER S. AHLBRANDT, FRED HERBOLZHEIMER, JR., BERNARD S. KUBALE, WILLIAM G. KUHNS, LOUIS H. RODDIS, JR., CHARLES M. WILLIAMS and HAMMERMILL PAPER COMPANY,

*Petitioners,*

vs.

HARRY LEWIS,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## Questions Presented

I. Whether Plaintiff Lewis' reliance on an article in The Wall Street Journal renders his verification inadequate to satisfy Rule 23.1?

II. Whether the Court correctly held that no demand upon the Directors to bring suit is necessary where the Amended Complaint sets forth in detail a self interested transaction participated in and approved by all Directors as part of a scheme to perpetuate their control of the Company?

III. Whether the decision below that Plaintiff adequately represents the interests of other stockholders is erroneous?

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## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

### Statement of the Case

The only material error in Petitioners' statement of the case is the implication that no investigation was conducted by Plaintiff or his attorney prior to filing suit, other

than reading an article in the Wall Street Journal. (Petition at pp. 3, 5). As the Court of Appeals observed, Lewis' attorney, Markowitz (now deceased) produced his pre-suit investigatory file and testified that between July 30 and August 1, 1981, he examined: Icahn & Company's [hereafter "Icahn"] 13-D form, and amendments thereto (on file with the Securities and Exchange Commission), Hammermill Paper Company's [hereafter "Hammermill"] 10-K for 1979, proxy statements for Icahn and Hammermill, the Complaints filed in Court in connection with the proxy contest, and the files of a similar case in which Lewis was involved. Appendix A at 6a. Markowitz, however, respectfully declined to disclose his mental processes by which he concluded that litigation was warranted based on F.R.Civ.P. 26(b)(3), which explicitly states "... the Court shall protect against the disclosure of mental impressions, conclusions, opinions or legal theories of an attorney ..." See also, *United States vs. Nobles*, 422 U.S. 225, 238-39 (1975) and *Upjohn Company vs. United States*, 449 U.S. 383 (1981) which have broadly interpreted the scope of protection given by Rule 26(b)(3).[1]

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[1] In *Upjohn*, this Court protected against disclosure facts provided to in-house counsel from a witness, holding:

> "Rule 26 accords special protection to work product revealing the attorney's mental processes. The Rule permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship. This was the standard applied by the magistrate, Pet. App. 26a-27a. Rule 26 goes on, however, to state that '[i]n ordering discovery of such materials *when the required showing has been made*, the Court *shall protect* against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.'" *Id.* at 400 [Emphasis added].

Because of the above claim to privilege, although properly based on Rule 26(b)(3) and this Court's interpretations of that rule, the Trial Court announced orally at a "preliminary investigation" proceeding that it intended to dismiss the action with prejudice. (Appendix A at 7a; Appendix B at 2b).

Since the Court of Appeals found Plaintiff Lewis' investigation alone sufficient to satisfy the verification requirement, it did not reach the question of whether attorney Markowitz's investigation afforded a sufficient basis for Plaintiff Lewis' verification of the Complaint, nor whether Markowitz's claim to attorney work product was proper.[2] The Court of Appeals held that Plaintiff need not independently substantiate information contained in a respected financial journal before verifying his complaint:

> "Reliance on an article in *The Wall Street Journal* is not reliance on an insubstantial or meaningless investigation. Plaintiffs and their attorneys need not make further expenditures to prove independently that which may be read with some confidence of truthfulness and accuracy in a respected financial journal. We believe that such a basis satisfies the policy behind Rule 23.1 of discouraging strike suits. Neither the district court nor the defendants have identified any material errors or irregularities in the averments of the complaint. Without evidence that the allegations are without foundation, the district court's finding that the original complaint was not verified is an abuse of discretion. . . ." Appendix A at 17a-18a.

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[2] The Court of Appeals noted:

> "We note that Lewis' complaint contains many facts and much information that are not in the journal article. For purposes of our decision, however, we will assume that the heart of the complaint in need of verification—the allegations regarding the settlement—was solely derived from the article." Appendix A at 18a, Fn. 3.

## REASONS FOR DENYING THE WRIT

### Summary of Argument

This case raises no exceptionally unusual or difficult issues. The courts of appeals are not in conflict over the questions raised herein; nor does the Court of Appeals decision herein conflict with any decisions of this Court. The allegedly "conflicting" decisions are readily distinguishable, and there is no reason to believe that any other appellate court would have resolved this case differently.

This Court's decision in *Surowitz vs. Hilton Hotels Corporation*, 383 U.S. 363 (1966) permits verification, upon information and belief, of a complaint in a shareholder derivative action, where the verification is based on sources of information reasonably believed to be accurate. Moreover, there has been no showing in this case that the Complaint and amended Complaint were inaccurate in any material respect.

Rule 23.1, F.R.Civ.P., clearly contemplates that demand on the directors prior to filing suit is not required in *all* cases. Clearly, the present case falls within that narrow category of cases in which demand is not required where it is alleged that a majority of the Board of Directors participated, authorized and approved of the use of corporate funds to pay off an outsider to terminate a proxy contest to secure their own position and where a pattern of prior acts furthering the objective of frustrating outside attempts to obtain control is also alleged.

Petitioners fail to demonstrate that Plaintiff-Respondent is other than an adequate representative of the shareholders, and have failed to demonstrate that Plaintiff has any antagonistic interests to that of the shareholders.

The District Court made an unwarranted and unprecedented dismissal of Plaintiff's case for reasons totally unrelated to the merits of this litigation. The Court of Appeals restored justice by reversing, and in doing so, directed that the case be reassigned to another district judge (Appendix A at 20a-21a). It is respectfully submitted that no review by this Court is warranted.

**I. Plaintiff Lewis' reliance on an article in the Wall Street Journal does not render his verification inadequate to satisfy Rule 23.1.**

Petitioners' contention that the decision of the Court below conflicts with this Court's decision in *Surowitz vs. Hilton Hotels Corporation*, 383 U.S. 363 (1966) is completely erroneous.

As Petitioners correctly point out, F.R.Civ.P. 23.1 requires that a complaint in a shareholder's derivative action be verified. This is, of course, in contrast to all other federal civil actions, which need not be verified but need only be signed by counsel. The purpose of the 23.1 requirement of verification was articulated in *Surowitz* as "a means to discourage 'strike suits' by people who might be interested in getting quick dollars by making charges without regard to their truth so as to coerce corporate managers to settle worthless claims in order to get rid of them." *Id.* at 371.

In furtherance of this purpose, Mrs. Surowitz, a Polish immigrant with a very limited English vocabulary and practically no formal education, *Id.* at 368, was held to have satisfied Rule 23(b)[1] even though she had almost no knowledge of the basis of the allegations in the complaint but acted entirely on the advice of her investment counselor and attorney. The District Court in *Surowitz* dismissed the action, and the Court of Appeals affirmed

[1] Now Rule 23.1.

concluding that plaintiff's verification of the complaint was false because she swore to the verity of alleged facts of which she was wholly ignorant. 342 F.2d 596-606. This Court, in reversing and remanding the case for trial on the merits, held that no requirement of personal knowledge of the facts on the part of the complainant was necessary:

> "It is difficult to believe that anyone could be shocked or harmed in any way when, in light of all these circumstances, Mrs. Surowitz verified the complaint, not on the basis of her own knowledge and understanding, but in the faith that her son-in-law had correctly advised her either that the statements in the complaint were true or to the best of his knowledge he believed them to be true." 383 U.S. at 370-71.

Thus, it is clear under *Surowitz* that there is no requirement that the plaintiff have *personal* knowledge of the facts he verifies in his complaint and that he is permitted to rely on sources of information he reasonably believes to be accurate. The Court of Appeals in this case followed *Surowitz* in holding that Plaintiff's reliance on The Wall Street Journal article alone was sufficient basis to satisfy the verification requirement of Rule 23.1. The Court of Appeals therefore found it unnecessary to consider the additional investigation undertaken by Lewis' counsel[4] (Appendix A at 18a). The various District Court decisions cited by Petitioner (Petition, p. 8, fn 8), cannot, and do not, undercut *Surowitz*.[5]

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[4] Lewis verified the complaint only after attorney Markowitz advised him of the results of his investigation. Appendix A at 3a.

[5] The dicta in *Waldman vs. Carey*, 82 F.R.D. 469, 471 (E.D.Pa. 1979), that the verification requirement is to discourage suits by derivative plaintiffs who have no reason to believe the allegations in the complaint are true, follows *Surowitz* and has no application to the present case where the plaintiff has good reason to believe the allegations in the complaint are true.

(Footnote continued on following page)

No showing has been made that the complaint is not accurate in any material respect. Nor is there any reason to believe that a more extensive pre-suit investigation would have revealed any additional facts. Ultimately, this case will turn on questions of motive and intent, and pre-suit inquiry into these facts, made without the benefit of discovery taken under oath, would be an exercise in futility, especially since Petitioners were already litigating the legality of their position in *Icahn, et al. vs. Hammermill, et al.*, 80 Civ. 2080 (S.D.N.Y.) (allegations made that directors acted in self interest to retain control).

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(Footnote continued from preceding page)

In *Cohen v. Bloch*, (1979-80 Transfer Binder) Fed.Sec.L.Rep. (CCH) ¶97,176 (S.D.N.Y. Nov. 14, 1979), inquiry into the scope of the counsel's pre-suit investigation was held proper where plaintiff's deposition revealed she did not understand the complaint, and her attorney (who was the husband of plaintiff's stepdaughter) had recommended the investment initially and had informed plaintiff of the alleged actionable wrongs. In contrast, in the present case Plaintiff Lewis personally made the decision to invest, initiated the filing of the lawsuit, and fully understood the charges made in the complaint.

In *Rogosin vs. Steadman*, 65 F.R.D. 365 (S.D.N.Y. 1976), neither plaintiff actually initiated the litigation. One plaintiff signed the verification for the complaint at the request of an attorney, with no independent knowledge of or interest in the litigation, while the other plaintiff had never authorized institution of the suit and did not even know it had been filed until four years later.

Finally, *Porte vs. Home Federal Savings and Loan Association*, 409 F.Supp. 752, 754 (N.D.Ill. 1976), held simply that after removal of a derivative action from state to federal court, defendant could require plaintiff to verify the complaint, if he had not already done so, to comply with Rule 23.1.

The above cases are inapposite to the present case.

**II. The Court correctly held that no demand upon the directors to bring suit is necessary where the amended complaint sets forth in detail a self interested transaction participated in and approved by all directors as part of a scheme to perpetuate the control of the company.**

Admittedly, in formulating standards as to when demand upon the directors prior to bringing suit is excused, the various Courts of Appeals have approached the problem differently. However, it is clear that, notwithstanding Petitioners' contentions the Courts of Appeals for the First and Ninth Circuits, as well as all other appellate courts, would concur in the result reached in the case at bar.

The Court below concluded that in determining whether demand is necessary, the Trial Court should consider whether a demand would be likely to prod the directors to correct a wrong (Appendix A of 13a). The decision below agrees with and is in harmony with the majority view of all other appellate courts that mere approval of an allegedly injurious corporate transaction, absent self-interest or bias by a majority of the board, is insufficient to excuse demand. See *Greenspun vs. Del E. Webb Corporation*, 634 F.2d 1204, 1209-10 (9th Cir. 1980); *Heit vs. Baird*, 567 F.2d 1157, 1162 (1st Cir. 1977); and *In Re Kaufman Mutual Fund Actions*, 479 F.2d 257, 265 (1st Cir.) *cert. denied* 414 U.S. 857 (1973). But see *Liboff vs. Wolfson*, 437 F.2d 121, 122 (5th Cir. 1971) (*per curiam*) adopting a more liberal standard. See generally, Note, *The Demand and Standing Requirement of Stockholder Derivative Actions*, 44 U.Chi.L.Rev. 168, 176-77 (1976) (*Kaufman* represents the preferred view). Likewise, the Court below is in agreement with the unanimous view of the cases that the allegation that demand upon the directors would be futile because the directors "would be suing themselves" is not alone sufficient to excuse demand. See cases cited at Appendix A at 11a.

Petitioners argue, however, that the decision below conflicts with the Court of Appeals for the First Circuit's decision in *Heit v. Baird, supra*, which they contend requires district courts to consider (a) whether the transaction on its face is lacking in any proper corporate purpose, and (b) whether the directors are "interested". However, as the Court of Appeals for the First Circuit subsequently explained in *Untermeyer vs. Fidelity Daily Income Trust*, 580 F.2d 22, 23 (1st Cir. 1978), if a majority of the directors were interested in the transaction, no demand is necessary. As *Untermeyer* recognized, the distinction in *Kaufman, supra*, and *Heit* between actions that could, *prima facie*, serve a legitimate corporate purpose and those that could not, was made for the purpose of determining whether a participating trustee was sufficiently unconnected, or "disinterested" to be presumptively responsive to a demand, and not as a means of testing the substantive sufficiency of the complaint apart from that issue. *Id.* at 24.

Significantly, *Heit* itself held only that the district court did not abuse its discretion in determining that the facts pleaded did not make out with sufficient particularity misconduct that would excuse a demand on the directors. 567 F.2d at 1161. In *Heit*, the sale of stock challenged in the derivative action was not alleged with particularity to have been made at a grossly inadequate price, and nothing more erroneous than business judgment was thus asserted.[6] The Court in *Heit* therefore

[6] The fact that the language in one paragraph used to allege futility in *Heit* was substantially similar to language in this case (see Appendix A at 13a, fn. 2) is of no consequence. In *Heit*, the allegation that demand would have been futile, merely because the directors participated in, authorized and approved and were personally liable for the wrongs complained of, was not sufficient because nothing more than erroneous business judgment was alleged. In the present case, the allegations of participation, authorization and approval by the

(Footnote continued on following page)

concluded that in the absence of a showing that a majority of the board engaged in a facially improper transaction, demand on the directors was required. *Id.* at 1162. In the present case, the *Heit* standard was readily met. As the Court of Appeals below summarized:

> "(1) all of the board engaged in a self interested act, i.e., the 'payoff' to retain control of Hammermill; (2) all of the board members are 'interested' in the transaction; and (3) there were prior acts furthering their objective to frustrate outside attempts to obtain control of Hammermill." Appendix A at 10a.

Nor does the recent Court of Appeals for the First Circuit decision in *Grossman vs. Johnson*, 674 F.2d 115 (1st Cir. 1982) aid Petitioners. There, a bald allegation of conflict of interest was "at best tenuous and conditional, not direct, stark, apparent and 'unmistakable' ", *Id.* at 124, and the Court held that to "charge a true conflict of interest the Plaintiff should have at least spelled out the likelihood of one, not left the court with the bare possibility" of one. *Id.* at 125.

Petitioners also claim a conflict with the Court of Appeals for the Ninth Circuit decision in *Greenspun vs. Del E. Webb Corporation*, 634 F.2d 1204 (9th Cir. 1980). Petitioners' assertion of a conflict is simply based on a misreading of *Greenspun*, which does not require that the transaction be completely devoid of corporate purpose. Rather, the fact that a particular transaction is completely undirected to a corporate purpose is one basis by which self-interest might be shown. Thus, *Greenspun* quotes with approval the Court of Appeals for the First Circuit standard as stated in *Kaufman, supra:*

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directors, included particularized allegations in other paragraphs that the directors engaged in a "payoff" to retain control of Hammermill; that a majority of the board members were "interested" in the transaction; and that there were prior acts furthering their objective to frustrate outside attempts to obtain control of Hammermill.

> "[w]here mere approval of corporation action, *absent self interest or other indication of* bias, is the sole basis for establishing the director's 'wrongdoing' and hence for excusing demand on them, plaintiff's suit should ordinarily be dismissed." (Emphasis added) 634 F.2d at 1210.

Where self-interest or other indication of bias is shown, as in this case, the fact that the transaction may, superficially, be directed at a corporate purpose, does not render demand necessary. The complaint failed in *Greenspun* because it merely alleged knowledge and participation by the directors, but failed to disclose acts by a majority of the board showing self interest *or* that the questioned acts were not directed to corporate purposes. In the present case, self interest of the majority of the board of directors has been alleged with particularity, *i.e.*, to retain their positions with Hammermill, and prior acts furthering that end are also alleged (See Appendix A, 9a to 10a).

In sum, the decision below is consistent with all other courts of appeals' decisions, and the cases cited by Petitioners would not require a contrary result. Rule 23.1 clearly contemplates some circumstances under which demand upon the directors is excused. If demand under Rule 23.1 is not excused in this case, it is difficult to imagine any case in which demand need not be made. Here, the majority of the board of directors caused the corporation to pay a third party to terminate a proxy contest for the purpose of entrenching themselves as directors and maintaining control of the Company with the attendant financial benefits to themselves. The amended complaint demonstrates a factual pattern which itself is strong circumstantial evidence of an intention to direct corporate affairs in the directors' own self interest.

Since demand is clearly excused herein, this case is not an appropriate vehicle for this Court to delineate the fine line between situations where demand is necessary and situations where it is not. An attempt to delineate that line in this case would require this Court to speculate about factual patterns that are not before it, contrary to the sound policy of deciding only those matters that are necessary, when actually presented in a case or controversy. The present case can readily be resolved correctly by denial of the Petition for a Writ of Certiorari.

**III. The decision below that Plaintiff adequately represents the interests of other stockholders is not erroneous and does not conflict with decisions of other Courts of Appeals.**

The Court of Appeal's opinion states that at Plaintiff Lewis' deposition taken over four months after he verified the Complaint he "displayed a complete ignorance of facts concerning the transaction he was challenging." (Appendix A at 20a). Petitioners argue that for this reason alone, Plaintiff cannot be a fair and adequate representative of the interests of other shareholders. The Court of Appeals rejected that view and concluded that the adequacy of representation standards applicable to Rule 23 class actions are also applicable to shareholder derivative actions under Rule 23.1. The Court of Appeals therefore followed its opinion in *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3d Cir. 1975), *cert. denied* 421 U.S. 1011 (1975), where it stated:

> "Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those to those of the class." (Appendix A at 19a).

The cases relied upon by Petitioners are inapposite.

Initially, it is noted that the Court of Appeals' statement that Plaintiff Lewis was completely ignorant of facts at his deposition is not totally accurate. The District Court did not find that Lewis did not understand the facts concerning the transaction he was challenging,[7] and did not find Plaintiff Lewis' representation of the class inadequate in that respect. The Court of Appeals' statements as to Lewis' understanding of the facts are thus over-simplifications of the facts as found by the District Court. While Plaintiff Lewis lacked knowledge about certain of the facts concerning the challenged transaction, he unquestionably demonstrated a full comprehension of the theory of his lawsuit, and of his obligations as a representative of other stockholders.[8]

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[7] Because Lewis did not have first hand information but relied on the Wall Street Journal article and on the investigation by attorney Markowitz, the District Court did find that Lewis had "no idea as to whether the facts in the complaint were correct or based on any credible information . . . ." (Appendix B at 6b). This finding does not imply that Lewis did not understand the complaint or the nature of his action.

[8] Lewis' deposition reveals the following testimony upon examination by Attorney Zimet for Defendant-Petitioners:

> Q. . . . what was it that led you to conclude that this was not in the best interests of your company, Hammermill, at the time you read the article in The Wall Street Journal?
>
> A. Well, the impression that I got from the article was that Hammermill was giving away $750,000 of its funds in order to buy security for the officers and directors of the company.
>
> Appendix in Court of Appeals, p. 110a.
>
> * * * *
>
> Q. Do you have any basis for believing that the directors received any benefits in connection with the settlement of Mr. Icahn?
>
> A. Oh, yes.
>
> Q. What benefits are those?
>
> A. They secured their position in the company for the next couple of years at least.

(Footnote continued on following page)

None of the cases cited by Petitioners conflict with the Court of Appeals decision in this case. As both Courts in *Davis v. Comed, Inc.*, 619 F.2d 588, 593-94 (6th Cir. 1980) and *Rothenberg v. Security Management Company, Inc.*, 667 F.2d 958, 961 (9th Cir. 1982) acknowledge, whether a particular plaintiff will fairly and adequately represent the interests of other similarly situated shareholders as required by Rule 23.1 turns upon the total facts and circumstances of each case. Contrary to Petitioners' contention, both *Davis* and *Rothenberg* are substantially dissimilar from the present case, and neither opinion would require a different conclusion in the present case.

In *Davis v. Comed*, which Petitioners failed to even cite to the Court of Appeals, the Sixth Circuit Court of Appeals held that the District Court should not have permitted plaintiffs to represent other shareholders in a derivative action. In particular, plaintiffs there sought rescission of a corporate sale of real estate. However, the claim for rescission was unfounded; the other shareholders of the corporation overwhelmingly ratified the transaction; rescission would have subjected the corporation to substantial liability under an indemnity provision;

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(Footnote continued from preceding page)

Q. How is that?

A. Mr. Icahn agreed not to engage in a proxy contest and try to take over the company for two years.

Appendix in Court of Appeals, p. 117a.

With respect to Mr. Lewis' obligations as a representative Plaintiff, he testified as follows:

Q. And can you describe for me generally what is it that you can understand your obligations to be?

A. My obligations are to proceed diligently, to act in good faith, in the best interests of the corporation.

Q. Do you also have any understanding as to what your financial obligations are in terms of—

A. My financial obligations would be to pay for disbursements in the event that I lost the case.

and, most importantly, the representative plaintiffs were acting as a front for others whose interests were inimical to the interests of the shareholders who plaintiffs purported to represent. Representative plaintiff Davis hoped to benefit personally through development of the real estate if rescission could be accomplished, perhaps obtaining as much as a $200,000.00 profit. In addition to this economic antagonism to the interests of other shareholders, Davis had been involved in other litigation with defendant in several courts, and the derivative action was just one more skirmish intended to create leverage in Davis' other law suits. Davis bears no resemblance to the present case.

In *Rothenberg*, the Court found plaintiff to be an inadequate representative to bring a shareholder derivative action based upon a totality of the circumstances. These facts included not only Mrs. Rothenberg's unawareness of the facts and issues involved in the suit, but her own acknowledgement that her lack of personal knowledge made her an inappropriate plaintiff to maintain the suit, her obvious unwillingness to learn about the suit by not acquiring more than a rudimentary understanding of the case, and the fact that she had little to gain from the suit and displayed no strong commitment to the action. Mrs. Rothenberg originally brought suit for her own personal benefit and not for the benefit of the corporation, since her objective was to recover her personal losses. She had not even read the amended complaint, and had no clear understanding that a recovery in the derivative suit went to the corporation and only indirectly benefitted shareholders.[9]

[9] In contrast to the present case where Plaintiff is himself an attorney and understands corporate matters, the *Rothenberg* plaintiff had not, until her third deposition, obtained even a rudimentary understanding of the nature of a derivative suit. Even then,

> "... responding largely to leading questions, she testified that a recovery in a derivative suit went to the corporation. Her grasp of the issues and facts, however, remained at best minimal. ...") *Id.* at 962, fn. 10.

Accordingly, the Court in *Rothenberg* held that the district court had not abused its discretion in granting a motion to dismiss on the grounds the plaintiff was an inadequate representative of the shareholders. The Court cautioned, however:

> "In rendering our decision, we do not mean to infer that a representative plaintiff must have a precise understanding of every fact or legal issue in a derivative suit. Nor do we intimate that the plaintiff will sacrifice his/her status as a representative plaintiff by granting an attorney broad discretion to investigate and pursue her claim . . . ." *Id.* at 963.

In contrast to *Rothenberg*, Plaintiff Lewis initiated the present action based upon his own reading and understanding of an article in The Wall Street Journal. Significantly, Lewis' "past experience suggest that he and his counsel will be able to provide vigorous advocacy for the members of the class he now seeks to represent." *Markewich vs. Adikes*, 76 F.R.D. 68, 75 (E.D.N.Y. 1977), Appendix A at 19a-20a. In the present case, Petitioners failed in their burden to demonstrate the Plaintiff's representation was not adequate. See Appendix A at 19a, citing *Smallwood vs. Pearl Brewing Co.*, 489 F.2d 579, 592-93 n. 15 (5th Cir. 1979).

In sum, Petitioners have demonstrated no conflict between the present case and any other appellate court decision. The adequacy of representation issue is clearly one to be decided on a case by case basis, in light of all the circumstances, as *Rothenberg* and *Davis* both acknowledge. Neither of those decisions are dispositive of the case at hand, and there is no conflict between the decision of the Court of Appeals for the Third Circuit in this case and the decisions of any other appellate court.

## Conclusion

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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